In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JUAN JOSE VILLATORO,

Defendant and Appellant.

Case No. S192531

Second Appellate District, Division Eight, Case No. B222214
Los Angeles County Superior Court, Case No. BA339453
The Honorable William Sterling, Judge

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ISSUE PRESENTED

Was the modification of CALCRIM No. 1191, which told jurors they could consider evidence of a *charged* offense in determining defendant's propensity to commit the other charged offenses pursuant to Evidence Code section 1108, reversible error when the court told jurors that all charged offenses must be proved beyond a reasonable doubt?

INTRODUCTION

Appellant was charged and convicted of multiple counts of kidnapping, robbery, rape, and other sex crimes committed against five women over a three-year period. At trial, the jury was instructed with a modified version of CALCRIM No. 1191, which told the jurors that they could consider evidence of a charged offense as propensity evidence under Evidence Code section 1108[1] if the prosecutor proved the charged offense beyond a reasonable doubt.

On appeal, appellant argued that this instruction improperly allowed the jury to use evidence of his guilt of one of his charged offenses as evidence of his propensity to commit the other charged offenses. Appellant also claimed that the instruction unconstitutionally shifted the burden of proof in violation of his due process and equal protection rights. The Court of Appeal rejected these claims and affirmed the conviction.

STATEMENT OF THE CASE

At his jury trial, appellant's attacks on the five victims were established by the evidence as follows:

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[1] All further undesignated statutory references are to the Evidence Code.

R.I.

On May 25, 2005, at approximately 3:00 a.m., a prostitute named R.I. was working in the area of Western and Beverly when appellant pulled up in a Honda Civic and asked if she would "date" him for some money. R.I. agreed to have sex with appellant for $80 and got into appellant's car. After driving to a dark residential area, appellant climbed over to R.I.'s seat while holding a black gun and told her he would kill her if she moved. Appellant raped R.I. both vaginally and anally, and whipped her back with electrical cords for approximately 20 minutes. After appellant was finished, he took R.I.'s phone and told her to get out of the car. Appellant did not give R.I. any money before driving off.

R.I. was given a rape examination at the Centinela Hospital where she was also treated for the injuries to her back. The nurse examiner noticed multiple horizontal and diagonal bruising on R.I.'s back, vaginal bruising, and swelling on her legs. The DNA sample collected during the rape examination matched appellant's DNA.

On July 28, 2008, R.I. identified appellant out of a photographic lineup as her attacker.

N.G.

On June 21, 2006, between 12:00 a.m. and 1:00 a.m., 18-year-old N.G. was walking home when she was approached y appellant in a white Honda. Appellant pointed a black gun at N.G. and said, "Get in the car or I will kill you." Appellant drove to a dark residential area while holding a razor to N.G.'s ribcage. After parking the car, appellant climbed over to N.G.'s seat and had vaginal intercourse with her. He also fondled N.G.'s breasts and inserted his finger into her vagina. After the intercourse, appellant took N.G.'s phone, rings and sunglasses before releasing her.

N.G. ran for help and the police were called. While crying hysterically, N.G. told the police officer that she had been raped. She was taken to the Santa Monica UCLA Medical Center where the nurse conducted a rape examination, which demonstrated that N.G.'s physical injuries were consistent with her rape account. The DNA sample collected from N.G.'s body matched appellant's DNA.

On April 19, 2008, N.G. identified appellant in a six-pack photographic lineup. N.G. denied she was working as a prostitute on the date of the incident but admitted that she began working as a prostitute a few months after the rape.

B.G.

On February 3, 2008, at approximately 2:30 a.m., appellant pulled up in a burgundy Dodge Stratus next to a prostitute named B.G., who agreed to have sex for $100. Appellant drove B.G. to a residential area with no street lights. After stopping the car, appellant pulled out a stun gun, activated the spark and said, "Don't move." He held the stun gun against B.G.'s neck and threatened to kill her if she looked at him. Appellant jumped over to where B.G. was seated, leaned the passenger seat all the way back, and raped her vaginally and anally. Every time B.G. tried to look at appellant, he either slapped or spat at her.

After appellant was done, he told B.G. to get out. She came out of the car without retrieving any of her belongings or shoes, tripped over the curb and began running down the street. She went to a gas station and called her boyfriend, who took her to a nearby hospital. B.G. admitted lying to the police about how the rape occurred because she had outstanding warrants for prostitution and her boyfriend was on parole. B.G. refused to submit herself for a rape examination.

B.G. later identified appellant in a six-pack photographic lineup as her rapist. In 2009, after looking through appellant's pictures on the internet,

B.G. recalled that appellant was the same person who had raped her in the backseat of a car in 2007. He had pepper spray at the time but B.G. was eventually able to fight him off. B.G. had not reported the 2007 rape to the police earlier because she had outstanding warrants.

C.C.

On February 10, 2008, at approximately 2:45 p.m., appellant drove up to C.C. in a burgundy Dodge Intrepid and offered her a ride. She accepted the offer and asked him to drive to Hollywood. At some point, C.C. noticed that they were headed toward Santa Monica. Feeling nervous, C.C. asked appellant to stop the car so that she could use the restroom. Appellant pulled over and handed C.C. some baby wipes before she left toward the back of the car to urinate. Appellant also came out of the car and watched C.C. urinate.

When they returned to the car, appellant reached over with a black stun gun and told C.C. to take off her pants. Appellant pressed the button and sparked the stun gun before placing it near C.C.'s throat. Appellant climbed over to C.C.'s seat and punched her in the face while telling her to cover her face. He raped her vaginally, bit her left breast and nipple, and pulled her hair out. After he finished, appellant took C.C.'s purse and told her to get out.

C.C. ran for help, and the police were called. C.C. was taken to the Santa Monica UCLA Rape Crisis Treatment Center and was examined by a nurse. The nurse opined that C.C.'s physical injuries were consistent with her rape account. The DNA sample collected from C.C. matched appellant's DNA.

C.C. subsequently identified appellant out of a six-pack photographic lineup. She admitted that she had previously worked as a prostitute but denied she was doing so on the day of the incident.

K.J.

On April 4, 2008, at approximately 3:00 a.m., K.J. was working as a prostitute when appellant approached her in a burgundy Dodge Intrepid. K.J. got into appellant's car and they drove to a dark street. Appellant jumped on top of K.J. and told her he would kill her if she did not shut up. He pulled out a stun gun and turned it on and off to scare K.J. Appellant pulled down K.J.'s skirt and tore off her underwear. While having vaginal sex with K.J., he continued to tell her not to look at him. After he finished, appellant took K.J.'s jewelry and phone before letting her out.

K.J. ran for help and eventually was able to contact a friend to pick her up. K.J. told her mother about the rape and they went to the police station in the morning to file a report. She was later taken to the hospital and the nurse conducted a rape examination, which demonstrated that K.J.'s physical injuries were consistent with her account of rape. The DNA sample collected during the rape examination matched appellant's DNA.

K.J. assisted the police in preparing a composite drawing of the rapist. She identified appellant as her rapist out of a six-pack photographic lineup.

Appellant was arrested on April 19, 2008, while driving a burgundy Dodge Intrepid that matched the description given by the victims. After the arrest, the police confiscated a stun gun from appellant's laundry mat coworker, who stated that appellant used to carry an identical stun gun. A police expert testified that being shocked by a stun gun may cause blindness, heart attack, burns, scarring, infection, and in some instances, even death. He also testified that the stun gun used by appellant during the rapes had a much higher electric voltage output than the stun guns issued to police officers. A defense expert testified that the stun gun used by appellant could not cause serious injury or death.

The jury found appellant guilty of five counts of rape, one count of kidnapping to commit another crime, and four counts of robbery. The jury also found appellant used a firearm or deadly weapon in these crimes. He was sentenced to a combined prison term of 153 years to life.

On appeal, among other claims, appellant argued that the modified version of CALCRIM No. 1191 improperly allowed the jury to use evidence of his guilt of one of his charged offenses as evidence of his propensity to commit the other charged offenses. Appellant also claimed that the instruction unconstitutionally shifted the burden of proof in violation of his due process and equal protection rights. The Court of Appeal rejected these claims and found that section 1108 did not preclude the use of charged sex offenses to show propensity to commit another charged offense, and that considering the jury instructions as a whole, the modified instruction could not have interfered with the presumption of innocence or allowed the jury to convict on a lesser standard of proof.

ARGUMENT

THE TRIAL COURT PROPERLY INSTRUCTED THE JURORS THAT THEY COULD CONSIDER EVIDENCE OF A CHARGED OFFENSE AS PROPENSITY EVIDENCE PURSUANT TO EVIDENCE CODE SECTION 1108

The trial court modified CALCRIM No. 1191, which addresses the use of evidence of *uncharged* sex offenses to show propensity, as authorized by Evidence Code section 1108, to address the use of evidence of *charged* offenses to show propensity. Relying on *People v. Quintanilla* (2005) 132 Cal.App.4th 572 (*Quintanilla*),[2] appellant contends the modified

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[2] The United States Supreme Court later granted certiorari in *Quintanilla*, vacated the judgment, and remanded for consideration in light of *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (*Quintanilla v. California* (2007) 549 U.S. 1191 [127 S.Ct.

(continued...)

instruction violated due process because charged offenses may not be used to demonstrate propensity. Appellant's claim is meritless because *Quintanilla* was wrongly decided.

The Court of Appeal correctly concluded that the modified CALCRIM No. 1191 given in this case was proper because section 1108 does not preclude the use of charged offenses to show propensity to commit another charged offense. The plain wording of section 1108 does not differentiate between "charged" and "uncharged" offenses, and the use of charged offenses as propensity evidence is consistent with the legislative policy favoring joinder of offenses. Furthermore, there was no violation of appellant's due process rights because admitting charged offenses as propensity evidence did not invalidate section 1108's requirement for section 352 analysis and the exclusion, if necessary, that may be accomplished through the trial court's ability to limit the jury's consideration of the evidence. Additionally, the modified instruction informed the jury to apply the "beyond a reasonable doubt" standard when using the charged offenses as propensity evidence, and, together with other given instructions, there was no reasonable likelihood that the jury applied a standard other than proof beyond a reasonable doubt in convicting appellant. Finally, any error was harmless because of the overwhelming evidence of appellant's guilt.

A. Factual Background

The pattern jury instruction in CALCRIM No. 1191 sets forth the principle described in section 1108 regarding the use of propensity evidence as follows:

(...continued)
1215, 167 L.Ed.2d 40].) The Court of Appeal did not publish its opinion on remand.

The People presented evidence that the defendant committed the crime[s] of _____ <*insert description of offense[s]*> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] _____ <*insert charged sex offense[s]*>, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <*insert charged sex offense[s]*>. The People must still prove (the/each) (charge/[and] allegation) beyond a reasonable doubt.

[Do not consider this evidence for any other purpose [except for the limited purpose of _____ <*insert other permitted purpose, e.g., determining the defendant's credibility*>].]

At the end of the trial, the court modified the above pattern instruction to apply to charged offenses, and inserted a requirement that the prosecutor must prove every charged offense beyond a reasonable doubt before the jury could use it as propensity evidence. A draft version of modified CALCRIM No. 1191 was provided to both counsel and the court invited them to look over the changes over the weekend. (7RT 2770, 2773.) On

Monday, the court confirmed that both parties had looked over the proposed version of CALCRIM No. 1191 before including it in the jury instruction packet. No objections were asserted. (7RT 3002.) During the final instructions, the jury was instructed with the modified CALCRIM No. 1191 as follows:

> . . . The People presented evidence that the defendant committed the crime of rape as alleged in counts 2, 4, 7[,] 9[,] 12 and the crime of sodomy as alleged in count 14. These crimes are defined for you in the instructions for these crimes.
>
> If you decide that the defendant committed one of these charged offenses, you may but are not required to conclude from the evidence that the defendant was disposed or inclined to commit the other charged crimes of rape or sodomy and based on that also conclude that the defendant was likely to and did commit the other offenses of rape and sodomy charge.
>
> If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of a – of another charge.

(7RT 3035-3036.)[3]

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[3] This was the oral instruction read to the jury in court. The last sentence of the written version of this jury instruction stated, "The People must still prove each element of every charge beyond a reasonable doubt . . . before you may consider one charge as proof *of specific intent* of another charge." (2CT 249, italics added.) The Court of Appeal disregarded the discrepancy between the oral and written instructions because "[t]he written version's apparent limitation of the other charged offense evidence to proof of Villatoro's specific intent was not argued to the jury by the prosecutor[.]" (*People v. Villatoro* (2011) 194 Cal.App.4th 241 [124 Cal.Rptr.3d 477, 487, fn. 5].)

B. Section 1108 Permits the Use of a Charged Sex Offense to Show Propensity to Commit Another Charged Offense

Appellant argues that Evidence Code section 1108 permits juror consideration of only uncharged acts as evidence of a propensity to commit the charged offenses because the rule expressly requires that the propensity evidence be subjected to section 352 analysis. Appellant reasons that since a charged offense cannot be excluded under section 352, the Legislature must have intended section 1108 to apply only to uncharged offenses. Appellant also argues that the legislative history behind section 1108 further supports his interpretation that the rule is only applicable to charged offenses. (AOB 21-24.) None of appellant's assertions is correct.

1. The plain wording of section 1108 does not differentiate between "charged" and "uncharged" sexual offenses

Section 1108 authorizes the jury to draw an inference of propensity to commit a charged sex offense from evidence admitted to prove commission of another charged sex offense. Using the evidence in that fashion is contemplated by the plain language of the statute.

"The aim of statutory construction is to discern and give effect to the legislative intent. [Citation.] The first step is to examine the statute's words because they are generally the most reliable indicator of legislative intent. [Citations.] To resolve ambiguities, courts may employ a variety of extrinsic construction aids, including legislative history, and will adopt the construction that best harmonizes the statute both internally and with related statutes. [Citations.]" (*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026.)

Apart from sex offense (and domestic violence) cases, the potential admissibility of propensity evidence is restricted by statute:

> As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. (§ 1100.) But, except for purposes of impeachment (see § 1101, subd. (c)), such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion (§ 1101, subd. (a)), unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) *other than a disposition to commit such an act* (§ 1101, subd. (b)). Under section 1102, defendants in criminal cases may introduce evidence of their character or character traits to prove their conduct in conformity (§ 1102, subd. (a)), and the prosecution may use similar evidence to rebut that evidence (§ 1102, subd. (b)).

(*People v. Falsetta* (1999) 21 Cal.4th 903, 911, original italics (*Falsetta*).)

The use of propensity evidence in sex offense cases, on the other hand, is not circumscribed in the same manner. Indeed, the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.) Subdivision (a) of that section provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 352 states that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The Legislature in enacting section 1108 sought "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta*, *supra*, 21 Cal.4th at p. 911.) Section 1108 "permits rational assessment by juries of evidence so admitted," including "consideration of the other sexual

offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense." (*Id.* at p. 912, internal quotation marks omitted.)

The plain language of section 1108 encompasses evidence admitted to prove another charged offense, specifically, "evidence of the defendant's commission of another sexual offense or offenses." (§ 1108, subd. (a).) By its use of the term "another" rather than "uncharged," the Legislature demonstrated its intent to include both charged and uncharged offenses in its scope.

Further, permitting the jury to draw an inference of propensity based on charged offenses serves the legislative purpose of section 1108 to expand the admissibility of evidence in sex offense cases "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta, supra,* 21 Cal.4th at p. 911.) When there are multiple charges, the inference based on the evidence admitted as to one count that the defendant has the propensity to commit sex offenses is relevant to the defendant's guilt on another count. That is particularly true where, as here, the propensity inference cannot be drawn until the jury finds the defendant guilty beyond a reasonable doubt of the crime from which the propensity inference is to be drawn.

Furthermore, using charged offenses in this manner comports with the use of charged offenses under section 1101. It is well-established that when the requirements of subdivision (b) of that section are met, the jury may use evidence admitted to show guilt of one charge to infer matters such as intent, common plan, or identity as to another charge. In fact, this Court long ago recognized in *People v. Kelly* (1928) 203 Cal. 128 that where "[t]he indictment showed that the three murders were committed by

the same person, on the same day, and in the same city and county[,] . . . [t]he circumstances under which each crime was committed, and the proof required to establish it, necessarily threw light upon the other two." (*Id.* at p. 135.)

Since *Kelly*, this Court has repeatedly instructed that section 1101 evidence of charged offenses is admissible for the same purposes as of uncharged offenses. In *People v. Ochoa* (1998) 19 Cal.4th 353, this Court rejected a claim that the trial court should have instructed sua sponte that the jury could not consider evidence of a charged assault "for any other purpose, including propensity for violence." (*Id.* at p. 410.) This Court reasoned, "[E]vidence of each assault could be used under Evidence Code section 1101, subdivision (b), to show defendant's mental state for each other assault, namely his intent." (*Ibid.*)

The same principle was applied at trial in *People v. Kraft* (2000) 23 Cal.4th 978. There, the defendant was convicted of 16 counts of murder. Guilt as to some of the counts was based in part on inferences arising from evidence admitted to establish guilt of other counts. This Court recognized, "Physical evidence linked defendant to eight of the murders, but with respect to the remainder, the prosecution relied on the similarity of the modus operandi and the existence of the so-called death list . . . ." (*Id.* at p. 1002; see also, e.g., *id.* at p. 1062 ["given the commonality of certain features of the various offenses present in the record of this case, the task of determining the degree of distinctiveness and the number of such circumstances necessary to establish defendant's identity as the perpetrator of these offenses was a matter for the jury"]; *People v. Beagle* (1972) 6 Cal.3d 441, 456 [even if court had instructed jurors to "decide each count separately on the evidence and law applicable thereto, uninfluenced by their verdict on any other count, . . . it would not have instructed the jury 'to disregard its finding on the facts as regards any count in determining any

other count in which those facts are relevant.' [Citation.] Here all evidence was relevant to both counts"].)

More recently, in *People v. Catlin* (2001) 26 Cal.4th 81, this Court put to bed the notion that section 1101 evidence was limited to uncharged offenses. The defendant in *Catlin* argued that the trial court erred in refusing to give a proposed special instruction that stated that "'[e]vidence applicable to each offense charged must be considered as if it were the only accusation before the jury.'" (*Id.* at p. 153.) This Court found no error in the trial court's refusal to give the instruction and concluded that "under Evidence Code section 1101 the jury properly could consider other-crimes evidence in connection with each count, and also could consider evidence relevant to one of the charged counts as it considered the other charged count." (*Ibid.*)

A defendant in a case in which evidence is cross-admissible under section 1108 should not be in a different position than a defendant in a case in which evidence is cross-admissible under section 1101. It is equally appropriate to permit the jury to draw the legislatively authorized inference under section 1108 as it is to permit the jury to draw a legislatively authorized inference under section 1101. Under appellant's proposed rule, charged offenses could be used as in *Kelly*, *Ochoa*, *Kraft*, and *Catlin* to demonstrate the facts encompassed within section 1101 but not the fact encompassed within section 1108. Such a dichotomy is not only unjustified, it is counterintuitive given that section 1108 relaxes the restrictions of section 1101.

Appellant's argument to the contrary rests primarily on *Quintanilla*, *supra*, 132 Cal.App.4th 572. There, a divided Court of Appeal, construing section 1109 (the domestic violence analog to section 1108), disapproved of "instructions permitting the jury to consider charged domestic violence offenses as evidence of criminal propensity in connection with other

domestic violence charges joined for trial."[4] (*Id.* at p. 575.) But *Quintanilla*'s reasoning is flawed, its due process analysis truncated, and its discussion of the law of evidence incomplete.

The Court of Appeal in *Quintanilla* acknowledged that section 1109 "was clearly intended to make evidence of *uncharged* domestic violence admissible." (*Quintanilla*, *supra*, 132 Cal.App.4th at p. 579, italics added.) The court's conclusion as to the use of *charged* crimes, however, turned not on a positive statement of inadmissibility but rather on a misguided interpretation of the reference in sections 1108 and 1109 to section 352.

The court in *Quintanilla* repeatedly referred to the provision in section 1109, subdivision (a), that the evidence of other domestic violence "is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (See also § 1108, subd. (a).) Thus, the *Quintanilla* court reasoned,

> The Legislature was careful to provide that evidence of other domestic violence offenses may be excluded when it is unduly prejudicial. Our Supreme Court relied heavily on a parallel provision in section 1108 when it upheld the constitutionality of that statute, which was the first to authorize the admission of propensity evidence. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 917-918 . . . .) Evidence of other charged offenses cannot be excluded, however, no matter how prejudicial it may be.

(*Id.* at pp. 579-580.) Later, the *Quintanilla* court explained, "Given our Supreme Court's emphatic reliance on the trial judge's ability to exclude unduly prejudicial propensity evidence as a component of due process, we are reluctant to stretch section 1109 beyond its intended purpose to authorize instructions that permit the jury to draw an inference of criminal propensity from evidence pertaining to other charged offenses, which

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[4] Although *Quintanilla* dealt with section 1109, that section closely parallels section 1108, and permits criminal propensity evidence in domestic violence cases.

cannot be excluded under section 352." (*Id.* at p. 582.) The court held that "[w]ithout that safeguard, it is fundamentally unfair to allow the jury to infer the defendant's propensity to commit crimes of domestic violence from his commission of other charged offenses." (*Id.* at p. 580.) The court rejected the assertion that the plain language of the statute encompassed uncharged offenses because of this provision. (*Id.* at p. 583 ["Accordingly, the statute does not contemplate the use of other charged offenses to prove a defendant's disposition to commit domestic violence"].)

The primary defect in *Quintanilla* is the Court of Appeal's reading of a limitation into the statute that is not present on its face. The court effectively inserted a new term – uncharged – into the code, so that, as construed, section 1109, subdivision (a), provides, "[E]vidence of the defendant's commission of other *uncharged* domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Italics added.) Similarly, appellant would read section 1108, subdivision (a), as if it provided, "[E]vidence of the defendant's commission of another *uncharged* sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Italics added.) Such judicial amendment is improper. As this Court has "often explained, inserting additional language into a statute violates the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587, internal quotation and edit marks omitted.) Instead, the correct interpretation of section 1108's statutory language is precisely what the Court of Appeal in *People v. Wilson* (2008) 166 Cal.App.4th 1034 (*Wilson*) stated in rejecting *Quintanilla*'s reasoning – "the plain wording of Evidence Code section 1108 does not limit its application to cases involving uncharged sexual offenses . . . [because] [t]he statute does not distinguish

between charged and uncharged offenses." (*Wilson, supra*, 166 Cal.App.4th at p. 1052.)

As to *Quintanilla*'s assessment of the "intended purpose" of sections 1108 and 1109, that purpose is not fixed by the provisos regarding section 352. *Falsetta* conclusively stated the purpose of section 1108: "to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility" (*Falsetta, supra*, 21 Cal.4th at p. 911) and to permit the inference of disposition (*id.* at p. 912). It would be curious that when offenses are tried together so that the jury will "be made aware of the defendant's other sex offenses," the evidentiary bar that section 1108 lowered would be raised and the inference of propensity that it sanctioned would be precluded.

2. The use of charged offenses as propensity evidence is consistent with the legislative policy of favoring joinder of offenses

Moreover, concluding that the "intended purpose" of section 1108 is limited to permitting an inference of propensity from uncharged acts unnecessarily interferes with other legislative policies, interference that is avoided by hewing to the plain language of the statute, which authorizes the inference based on "commission of another sexual offense or offenses."

In particular, California has a strong preference for joinder of offenses. (Pen. Code, § 954; *People v. Manriquez* (2005) 37 Cal.4th 547, 574 [""The law prefers consolidation of charges. [Citation.] Where, as here, the offenses charged are of the same class, joinder is proper under section 954'"].) Erecting an absolute bar to the use of charged offenses to support an inference of propensity would create a strong counterincentive to joinder. In order to obtain the benefit of the looser standard for the use of character evidence – which the "'Legislature has determined'" to be

"""critical""" (*Falsetta*, *supra*, 21 Cal.4th at p. 911) – the prosecutor must separately try charges that the Legislature believes should ordinarily be joined. It would be absurd to interpret one statute in a manner that so dramatically undermines the purpose of another.

This absurdity is even more apparent in the context of sex offenses. The Legislature has taken additional steps to foster joinder of certain sex offenses, all of which are covered by section 1108, and certain domestic violence crimes. In Penal Code section 784.7, subdivision (a), the Legislature expanded the venue for particular sex offenses,[5] and in subdivision (b) of that section it expanded the venue for domestic violence offenses,[6] thereby increasing the opportunity for joinder of those offenses and other offenses properly joinable with them.

"The purpose of [Penal Code] section 784.7 is to permit offenses occurring in different counties to be consolidated so that a victim may be spared having to testify in multiple trials in different counties." (*People v. Betts* (2005) 34 Cal.4th 1039, 1059.) The Legislature sought to "'reduce to *one* the number of trials a victim must testify at, and reduce the overall time that they will be involved in trial.'" (*Id.* at p. 1059, fn. 15, italics added.)

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[5] Penal Code section 784.7, subdivision (a), provides in part, "When more than one violation of [certain sex offenses, including section 261] occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, *and for any offenses properly joinable with that offense*, is in any jurisdiction where at least one of the offenses occurred, subject to a hearing, pursuant to Section 954, within the jurisdiction of the proposed trial." (Italics added.)

[6] Penal Code section 784.7, subdivision (b), provides that "when more than one violation of Section 273a, 273.5, or 646.9 occurs in more than one jurisdictional territory, and the defendant and the victim are the same for all of the offenses, the jurisdiction of any of those offenses and *for any offenses properly joinable with that offense*, is in any jurisdiction where at least one of the offenses occurred." (Italics added.)

A rule excluding charged offense conduct from consideration under section 1109 would thwart this legislative purpose. It would undermine the expanded venue provisions of Penal Code section 784.7 and the joinder provision of Penal Code section 954 and increase the prospect that victims would have to testify multiple times, once as the subject of charged offenses and, potentially, multiple additional times as propensity witnesses to uncharged offenses.

Interpreting section 1108 so that it operates at cross-purposes with these joinder and more liberal venue provisions is especially inappropriate given the Legislature's apparent recognition that the evidentiary and procedural provisions serve a common goal. In particular, the Legislature expanded section 1108 and Penal Code section 784.7 in the *same* chapter law. (Stats. 2002, ch. 194; see also Cal. Const., art. IV, § 9 [single-subject rule].) Significantly, in combining these provisions, the bill's author aimed to serve this goal:

> The sponsor states if a defendant is charged with multiple sex crimes involving different victims in a number of different counties, the ability to introduce propensity evidence pursuant to Evidence Code Section 1108 virtually ensures that multiple victims will testify in any county that chooses to prosecute the defendant. Thus, if a defendant raped different victims in San Mateo, Santa Clara, and San Francisco, a prosecutor in Santa Clara would charge the defendant with committing rape and most likely introduce evidence of the other rapes in the adjoining counties to support the inference that the defendant was guilty. Thereafter, there could be separate trials in the adjoining counties relating to the offenses committed within their territorial jurisdiction. Unless the other cases were resolved by guilty plea, the victims who testified in the first trial would be required to testify in the other counties' courts.

(Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2252 (2001-2002 Reg. Sess.) May 7, 2002, p. 5.)[7] In sum, it is wrong to interpret section 1108 in a manner that increases the number of times rape victims must testify when the Legislature sought through Penal Code section 784.7 to reduce the number of times rape victims must testify.[8]

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[7] Copies of cited legislative history documents are attached to respondent's Motion for Judicial Notice filed concurrently with this brief.

[8] Appellant relies on a single reference to the term "uncharged sexual acts" in a Senate bill analysis in support of his conclusion that the Legislature must have intended section 1108 to apply to uncharged offenses only. (AOB 23-24.) Out of five bill analyses conducted by the Senate and Assembly prior to the enactment of section 1108, however, the first and only reference to the term "uncharged" is found in the earliest Senate Committee bill analysis. (Sen. Com. on Criminal Procedure, Analysis of Assem. Bill No. 882 (1995-1996 Reg. Sess.) as amended May 15, 1995, p. 2.) The four subsequent bill analyses utilized such terms as "another sexual offense" or "offenses of the same type" and contained no differentiating remark regarding the charging state of the sexual offense. (See Off. of Assem. Floor Analyses, 3d reading analysis of Assem. Bill No. 882 (1995-1996 Reg. Sess.) May 17, 1995, p. 1; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 882 (1995-1996 Reg. Sess.) as amended June 27, 1995; Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 882 (1995-1996 Reg. Sess.) as amended July 18, 1995, p. 1; Off. of Assem. Floor Analyses, Analysis of Assem. Bill No. 882 (1995-1996 Reg. Sess.) as amended July 30, 1995, p. 1.) As stated previously, there is no ambiguity in the plain language of section 1108 because it does not differentiate between a charged and an uncharged sexual offense. However, even assuming the statutory language is ambiguous, when considering section 1108's legislative history as a whole, an isolated reference to the term "uncharged" in an early bill analysis is hardly sufficient to conclude that the Legislature intended to limit section 1108 to uncharged sexual offenses only.

3. Allowing consideration of charged offenses as propensity evidence does not violate due process because section 1108's requirement for section 352 analysis is equally available to both charged and uncharged offenses

Contrary to the Court of Appeal's conclusion in *Quintanilla*, this disharmony is not warranted by the reference in section 1108 to section 352 or by *Falsetta*'s reliance on that reference. *Quintanilla* saw an "emphatic reliance" by this Court in *Falsetta* "on the trial judge's ability to exclude unduly prejudicial propensity evidence as a component of due process" and repeatedly referred to the section 352 provision. (*Quintanilla*, *supra*, 132 Cal.App.4th at p. 582.) To be sure, this Court did refer to that provision and quoted favorably from a Court of Appeal case that described the provision as "'a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352.'" (*Falsetta*, *supra*, 21 Cal.4th at p. 917; see also, e.g., *id.* at p. 918 ["section 352 affords defendants a realistic safeguard in cases falling under section 1108"].)

Yet it is equally true that this Court in *Falsetta* recognized that the Federal Rules of Evidence do not "*expressly* incorporate[ ] federal rule 403, the federal equivalent of section 352, requiring a weighing or balancing of relevance with possible undue prejudice." (*Falsetta*, *supra*, 21 Cal.4th at p. 920, original italics.) This Court explained, "The federal cases agree that in deciding whether to admit evidence under federal rule 413, the court must weigh or balance relevance against possible undue prejudice under federal rule 403, the federal equivalent of section 352. They hold, in short, that the possible exclusion of unduly prejudicial evidence saves federal rules 413 and 414 from attack on due process grounds. [Citations.] As previously

noted, California's section 1108 expressly incorporates a similar weighing process required by section 352." (*Id.* at p. 921.)

Thus, it is not the *express* inclusion of the reference to section 352 that matters; rather, it is the availability of the weighing process. Even if section 1108 did not include the proviso about section 352, the latter would still have applied because section 352 is the final hurdle to the admissibility of all evidence. The express provision merely makes the admissibility of the evidence under section 352 part and parcel of the question under section 1108, rather than a question to be addressed only if a defendant makes a specific objection based on section 352. In that respect, the proviso codifies the approach courts already follow when addressing other questions of character evidence under section 1101. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 ["to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'"]; see also Historical and Statutory Notes, 29B West's Ann. Evid. Code (2009 ed.) foll. § 1108, p. 352 ["'[A]n amendment was adopted to provide explicitly that Evidence Code [section] 352 remains applicable to evidence offered under the new [section] 1108. While [section] 1108 explicitly supersedes [section] 1101's prohibition of evidence of character or disposition within its scope of application, it does not supersede other provisions of the Evidence Code, such as normal restrictions in hearsay and the court's authority to exclude evidence presenting an overriding likelihood of prejudice under [section] 352. *Cf. People v. Ewoldt*, 7 Cal. 4th 380, 404-08 (1994) . . ."].) Thus, contrary to the *Quintanilla* court's understanding, the provision does not manifest a legislative desire to limit section 1108 to uncharged crimes.

But the central premise (and flaw) of *Quintanilla* is the proposition that the provision regarding section 352 would be evaded because "[e]vidence of other charged offenses cannot be excluded . . . no matter

how prejudicial it may be." (*Quintanilla*, *supra*, 132 Cal.App.4th at pp. 579-580.) The ability to *exclude* the evidence from trial, however, is not dispositive. The *Quintanilla* court overlooked the trial court's ability to limit the jury's consideration of the evidence. "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." (§ 355.)

Giving a requested limiting instruction would have the effect of excluding the evidence, not from the trial as a whole, but from the trial as to particular counts. Moreover, if the court were to sustain an objection to using the evidence for propensity, it would not instruct the jury on the use of the evidence for that purpose at all. In that circumstance, the instructions would "not offer the jurors any means by which to give effect to the irrelevant evidence" for that purpose. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 13 [114 S.Ct. 2004, 129 L.Ed.2d 1] [no means of giving effect to evidence defendant had received death sentence].)

It is, of course, presumed that the jury follows such limiting instructions. (*Greer v. Miller* (1987) 483 U.S. 756, 766, fn. 8 [107 S.Ct. 3102, 97 L.Ed.2d 618] [noting applicability of presumption "unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions [citation], and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant"].) That presumption extends to instructions to disregard evidence that has the potential to be used for improper character purposes. Thus, in *Spencer v. Texas* (1967) 385 U.S. 554 [87 S.Ct. 648, 17 L.Ed.2d 606], the United States Supreme Court considered a procedure in which, "through allegations in the indictment and the introduction of proof respecting a defendant's past convictions, the jury trying the pending criminal charge was fully informed of such previous derelictions, but was also charged by the court that such

matters were not to be taken into account in assessing the defendant's guilt or innocence under the current indictment." (*Id.* at p. 556.) The Court rejected a due process challenge to that procedure.

Spencer observed that a trial "of one defendant charged with multiple offenses[] furnish[es] inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally different charge. [Citations.] This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person . . . in the same trial is a valid governmental interest." (*Spencer*, *supra*, 385 U.S. at p. 562.)

The United States Supreme Court rejected the argument, advanced under "general 'fairness,'" that the court should distrust "the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case, or . . . that limiting instructions can never purge the erroneous introduction of evidence or limit evidence to its rightful purpose." (*Spencer v. Texas*, *supra*, 385 U.S. at p. 565; see also *United States v. Lane* (1986) 474 U.S. 438, 451, fn. 18 [106 S.Ct. 725, 88 L.Ed.2d 814] [noting "carefully crafted limiting instructions with a strict charge to consider the guilt or innocence of each defendant independently"].)

Quintanilla's due process analysis was flawed because the court never applied the due process test articulated by *Falsetta*. The court in *Quintanilla* apparently treated the claim presented there as being a facial challenge to section 1109. That is, the court considered the constitutionality of admitting evidence for propensity when the evidence could not be excluded from the trial, without regard to the effect in the particular case in which the issue arose. It did not, however, apply the test

Falsetta articulated. Such a broad challenge can be successful only if the statute "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Falsetta*, *supra*, 21 Cal.4th at p. 913.) Manifestly, admission of propensity evidence in sex offense cases does not ipso facto violate that principle given *Falsetta*'s approval of the admission of such evidence.

This Court in *Falsetta* recognized, however, the potential for the evidence to violate the due process clause on an as-applied basis. "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*Falsetta*, *supra*, 21 Cal.4th at p. 913.) An as-applied defect cannot justify the blanket rule announced by *Quintanilla*.

A successful as-applied challenge would at a minimum require that the evidence be inadmissible pursuant to section 352 and that a limiting instruction be inadequate to prevent use of the evidence for propensity purposes. Even then, however, the defendant would still need to show that the trial would be or was fundamentally unfair. If a trial court were to find such fundamental unfairness before trial, it could also sever the counts. The *Quintanilla* court rejected severance as a solution because "a defendant faces a higher burden in seeking a severance than in seeking to exclude other-crimes evidence." (*Quintanilla*, *supra*, 132 Cal.App.4th at p. 582.) But that is so because exclusion of evidence under section 352 can be effectuated for joined offenses by a limiting instruction. "Severance may nevertheless be constitutionally required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.)

Quintanilla and appellant conflate a violation of section 352 with a violation of the fundamental fairness mandated by the due process clause. (See AOB 29.) The former does not necessarily amount to the latter.

"[A]dmission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair. Accordingly, the due process argument is not identical to the trial objection" under section 352. (*People v. Partida* (2005) 37 Cal.4th 428, 436.) "When a trial court rules on an objection to evidence, it decides only whether that particular evidence should be excluded. Potential consequences of error in making this ruling play no part in this decision." (*Ibid.*) "Ordinarily, [a trial court] does not, and usually cannot, base [its ruling on an objection] on whether admitting prejudicial evidence would render the trial fundamentally unfair." (*Id.* at p. 437.)

Thus, even when confronted with an objection under section 352 to admission of propensity evidence premised on an uncharged offense, the trial court is not in a position to address whether admission of the evidence would render the trial fundamentally unfair. It may exclude the evidence under section 352, thereby ensuring there is no due process violation, but admitting evidence of uncharged offenses or instructing the jury on the use of evidence of charged offenses does not necessarily violate due process, even if the evidence should have been excluded pursuant to section 352 from the trial (for uncharged offenses) or cabined by a requested limiting instruction (for charged offenses).

Consequently, it is irrelevant that "[t]he balancing process contemplated in *Falsetta* does not occur on a motion to sever charges" (*Quintanilla, supra*, 132 Cal.App.4th at p. 582) because that balancing under section 352 does not ordinarily address the fundamental fairness issue presented by a due process claim (*People v. Partida, supra*, 37 Cal.4th at p. 437). The availability of severance pretrial and review for fundamental fairness post-trial fully protects a defendant's due process rights. (See also *People v. Ochoa, supra*, 19 Cal.4th at p. 409 [court will review ruling denying severance that was correct when made to determine

whether joinder actually resulted in unfairness amounting to denial of due process].)

Here, the Court of Appeal found that the trial court's express reliance on *Wilson*, *supra*, 166 Cal.App.4th 1034, in crafting the modifications to CALCRIM No. 1191 allowed an inference that "the trial court gave the instruction because it found that all the requirements of the holding in *Wilson*, including a section 352 analysis, had been satisfied." (*People v. Villatoro*, *supra*, 124 Cal.Rptr.3d at p. 492.) Appellant insists this was an erroneous conclusion because the trial court failed to explicitly conduct any type of balancing analysis prior to deciding to instruct with CALCRIM No. 1191. (AOB 28-29.) But independent of whether section 1108 permits the use of charged or uncharged sexual offenses as propensity evidence, it is undisputed that the statute expressly imposes the requirement for a section 352 analysis prior to the admission of any propensity evidence. Thus, in order for the court to admit, and instruct the jury about, evidence of charged offenses for propensity purposes, the court presumably conducted the mandatory section 352 analysis. (See *People v. Williams* (1997) 16 Cal.4th 153, 213 ["a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352"].) Therefore, in addition to the court's reliance on the holding in *Wilson*, the fact that any propensity evidence in this case was admitted pursuant to section 1108 necessarily leads to a conclusion that such evidence was also admissible pursuant to section 352.

4. The modified instruction did not interfere with the presumption of innocence or allow the jury to convict on a lesser standard than proof beyond a reasonable doubt

Finally, the Court of Appeal in *Quintanilla* stated that it did not "believe the Legislature meant for juries to weigh the evidence supporting domestic violence charges under two different standards of proof – beyond a reasonable doubt on each charged offense, but preponderance of the evidence for purposes of assessing a defendant's propensity. . . . [T]he trial court told the jury to consider charged offenses under the preponderance standard for purposes of drawing a propensity inference, while also weighing the same evidence under the reasonable doubt standard for purposes of deciding Quintanilla's guilt on each charge. Such mental gymnastics may or may not be beyond a jury's ability to perform, but we are confident they are not required by section 1109." (132 Cal.App.4th at p. 583.)

There is, however, nothing unusual about a jury's consideration of evidence under different standards. This Court approved that very practice in *People v. Reliford* (2005) 29 Cal.4th 1007, 1016. The court in *Quintanilla* thought *Reliford* inapposite because the trial court's instructions in *Quintanilla* were "significantly different from those" in *Reliford*. (*Quintanilla*, *supra*, 132 Cal.App.4th at p. 583.) The *Quintanilla* court appears to have been particularly concerned that the same evidence was being considered for propensity and for guilt. Yet juries operate under that circumstance when considering evidence of one count for purposes of inferring matters such as identity and intent as to another count in cases in which counts that would be cross-admissible if tried separately are joined. Moreover, circumstantial evidence that is not essential to a finding of guilt need not be found true beyond a reasonable doubt. (See *People v. Watson* (1956) 46 Cal.2d 818, 831.) If a jury finds it more likely than not that a defendant committed the sex offense charged in count A, that belief supports an inference of propensity, which in turn supports an inference that it is likely that the defendant committed the sex offense in count B.

The jury would not convict based solely on that inference, however, as it would understand the need to find all of the elements of count B true beyond a reasonable doubt. (*People v. Reliford*, *supra*, 29 Cal.4th at pp. 1013-1016.) There is, therefore, no lowering of the burden of proof of guilt. (*Falsetta*, 21 Cal.4th at p. 920.)

But regardless of any "mental gymnastics" when different standards are given to the jury, that circumstance is not present here. The jury was not instructed that a propensity inference was available based on a preponderance of the evidence as to another count. Rather, the propensity inference as to other charged offenses was available only if the jury "decide[d] that the defendant committed a charged offense." (7RT 3035-3036.) The jury had to find guilt beyond a reasonable doubt as to one charged offense before it could draw an inference of propensity as to another charged offense. The jury was further instructed that the conclusion that appellant "committed a charged offense . . . is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt . . . ." (2CT 249.) Additionally, as pointed out by the Court of Appeal below, the jury was also "instructed with CALCRIM No. 220 on the meaning of that standard of proof, including the admonition that the defendant is presumed innocent, and that only proof beyond a reasonable doubt could overcome that presumption." (*People v. Villatoro*, *supra*, 124 Cal.Rptr.3d at p. 490; see 2CT 252.) Thus, no mental gymnastics were required of the jury, and the burden of proof was not lowered.

Because the evidence admitted to prove a sex offense as to one count was admissible to infer a propensity to commit another count, the trial court properly instructed the jury.

C. Any Error Was Harmless

Even if there were section 1108 or 352 error in instructing the jury that it could consider evidence of the charged offenses as propensity evidence, it would not be reversible unless appellant were to show a reasonable probability he would have obtained a more favorable result absent the alleged error. (See *People v. Gonzales* (2011) 51 Cal.4th 894, 924; *People v. Walker* (2006) 139 Cal.App.4th 782, 808; *People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659.) Appellant cannot make this showing.

The evidence against appellant of every charged offense was overwhelming. Appellant was positively identified as the rapist by all five victims. (3RT 944, 1262; 4RT 1521; 5RT 1839, 1896-1897; 6RT 2209-2211, 2215, 2218.) Appellant also stipulated that his DNA was found in four out of the five victims, undeniably establishing that he had sexual contact with R.I., N.G., C.C., and K.J. (2RT 2-3; 5RT 1933-1936; 6RT 2184.) Combined with the evidence of appellant's modus operandi of targeting young prostitutes in the early hours of the morning by using a stun gun, there is no reasonable likelihood that appellant would have received a more favorable result even if the jury had not been instructed to consider evidence of charged offenses as propensity evidence to commit other charged offenses. Therefore, any error was harmless.

CONCLUSION

For the reasons stated, respondent respectfully requests that this Court affirm the decision of the Court of Appeal and uphold the judgment of conviction.

Dated: November 28, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 8,657 words.

Dated: November 28, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Juan Jose Villatoro***
No.: **S192531**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 28, 2011, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 28, 2011, at Los Angeles, California.

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Declarant

Signature

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